



**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL BRUCE BYNOE,

Petitioner,

vs.

HELLING,

Respondent.

3: 07-cv-0009-LRH-VPC

ORDER

Petitioner is proceeding with counsel in this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case proceeds on the first amended petition filed April 28, 2008. (Docket #17.) On May 13, 2009, the court entered an order finding that it was undisputed that the claims in the first amended petition were unexhausted. (Docket #29.) In that order, this court also held in part as follows:

As a general matter, a claim is technically exhausted if the court to which the petitioner would be required to present the claim would find the claim procedurally barred. *See, e.g., Cassett v. Stewart*, 406 F.3d 614, 621 & n.5 (9th Cir. 2005). This does not mean, however, that a lack of exhaustion is “excused” by a showing of cause and prejudice that is offered to overcome a procedural default. Two distinct rules instead are being applied – first, a rule that a procedurally barred claims is technically exhausted, and second, a rule that a procedural default may be overcome by a showing of cause and prejudice. [Footnote one.]

This fundamental distinction is significant because the Nevada state courts apply substantially the same standards for avoiding a procedural default as do the

1 federal courts. This Court accordingly, in numerous prior cases, has declined to hold
 2 claims exhausted on the premise that the state courts would not consider the claims
 3 absent an unequivocal stipulation by petitioner that the claims in fact would be denied
 4 on procedural grounds if he returned to state court to present the claims. Such an
 5 unequivocal stipulation, to in truth be unequivocal in light of the application of the
 6 procedural default rules under current Nevada state post-conviction procedure, must
 7 include stipulations that: (1) petitioner cannot avoid dismissal of the claims in state
 8 courts because he cannot demonstrate cause and prejudice in the state courts to
 9 overcome the procedural bars; [footnote two] (2) petitioner cannot avoid dismissal of
 10 the claims in the state courts because he cannot demonstrate in the state courts that the
 11 alleged constitutional violation probably resulted in the conviction of one who is
 12 actually innocent and cannot thereby overcome the procedural bars; [footnote three]
 13 and (3) the procedural bars otherwise are now consistently applied by the Nevada
 14 state courts, such that it is not possible that the state courts, as a discretionary matter,
 15 would consider the claims despite the procedural default and despite a failure to
 16 demonstrate either cause and prejudice or actual innocence. In the absence of such an
 17 unequivocal stipulation, the Court will not hold that there is no possibility that the
 18 unexhausted claims would be considered by the state courts in Nevada. [Footnote
 19 four.] Any holding of exhaustion on this basis further will be subject to a possible
 20 dismissal of the claims on the basis of procedural default. [Footnote five.]

11 IT IS THEREFORE ORDERED that the petition, as amended, will be
 12 dismissed without prejudice unless, within thirty (30) days of entry of this order,
 13 petitioner files an unequivocal stipulation as described on pages 2 to 3 of this order or
 14 seeks other appropriate relief consistent with the holding therein. Petitioner shall file
 15 a declaration that he authorizes the stipulation made or relief sought within ten (10)
 16 days of the filing by counsel.

14 (Docket #29, p.2-3.)

15 Footnote one: To the extent that petitioner relies on non-binding case authority that
 16 would suggest that the exhaustion requirement is itself excused by circumstances that
 17 would show cause and prejudice, independent of a procedural default analysis, the
 18 Court is not persuaded. The Court in particular is not persuaded by authority from
 19 another circuit that is more than four decades old to the extent that the authority does
 20 not address exhaustion and procedural default as related by distinct concepts.

19 Footnote two: *See, e.g., Mitchell v. State*, 149 P.2d 33, 36 (Nev. 2006) ("A
 20 petitioner can overcome the bar to an untimely or successive petition by showing
 21 good cause and prejudice."); *see also Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3
 22 (9th Cir. 2004) (recognizing that Nevada's cause and prejudice analysis and the federal
 23 cause and prejudice analysis are nearly identical).

22 Footnote three: *See, e.g., Mitchell*, 149 P.3d at 36 ("Even when a petitioner cannot
 23 show good cause sufficient to overcome the bars to an untimely or successive
 24 petition, habeas relief may still be granted if the petitioner can demonstrate that 'a
 25 constitutional violation has probably resulted in the conviction of one who is actually
 26 innocent,' citing *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d
 397 (1986)).

Footnote four: *Accord Jones v. McDaniel*, 2009 WL 890915 (9th Cir. Apr. 2, 2009) (in
 an unpublished disposition, holding that the petitioner had not established futility of
 exhaustion, given the substantial similarity of Nevada state and federal standards to

1 overcome a procedural bar).

2 Footnote five: The Court rejects petitioner's parallel argument as to the absence of
3 available state remedies for the reasons in the text. Petitioner's request for an
4 evidentiary hearing to demonstrate a basis for excusing the exhaustion requirement is
5 denied. The request for an evidentiary hearing to "excuse" a lack of exhaustion
6 similarly overlooks the distinction between exhaustion and procedural default.
7 Petitioner can make his cause and prejudice arguments to the state courts in an effort
8 to overcome the potential procedural bars.

9 Petitioner did not file the stipulation described in the court's order quoted above.
10 Rather, on June 15, 2009, petitioner filed a motion for stay and abeyance of this case under *Rhines v.*
11 *Weber*, 544 U.S. 269, 125 S.Ct. 1528, 1535 (2005). Respondents oppose the motion.

12 Under *Rhines v. Weber* district courts have the discretion to hold a mixed petition in
13 abeyance pending exhaustion of the unexhausted claims. "A *Rhines* stay is only available for a
14 mixed habeas petition where at least some claims have been exhausted." *Jones v. McDaniel*, 320
15 Fed.Appx. 784, 786 (9th Cir. 2009). Additionally, under *Kelly v. Small*, 315 F.3d 1063 (9th Cir.
16 2003) district courts have the discretion to stay a fully exhausted petition. *See King v. Ryan*, 564
17 F.3d 1133(9th Cir. 2009) (holding that the three-step stay-and-abeyance procedure established in
18 *Kelly* remains viable after *Rhines*). However, it is well established law in this circuit that a petition
19 containing only unexhausted claims must be dismissed. *Jiminez v. Rice*, 276 F.3d 478, 481 (9th
20 Cir.2001), *cert. denied*, 538 U.S. 949 (2003); *Rasberry v. Garcia*, 448 F.3d 1150 (9th Cir. 2006).
21 Thus, to allow a petitioner to maintain an action containing only unexhausted claims would be
22 directly contrary to controlling authority. *See also*, 28 U.S.C. § 2254(b)(1); *Rose v. Lundy*, 455U.S.
23 509, 522, 102 S.Ct. 1198 (1982) (adopting a rule of "total exhaustion").

24 As explained in this court's order of May 13, 2009 (Docket #29), this court will not
25 generally consider unexhausted claims to be exhausted on the ground that the state courts will not
26 consider the claims, i.e., the state court would find that the claims were procedurally defaulted. This
is because Nevada courts may excuse procedural bars of untimely or successive filings if a petitioner
shows good cause and prejudice. Nev.Rev.Stat. §§ 34.726(1), 34.810(3). The exception to this

1 court's general practice, as previously stated by the court, is occasioned by the entry of pertinent
2 stipulations by the petitioner. In this case, petitioner has chosen not to file such stipulations.¹
3 Accordingly, the court finds that a Nevada state remedy is still available to petitioner and returning
4 to state court is not futile.

5 In light of the foregoing, the court will deny petitioner's motion for a stay pursuant to
6 *Rhines v. Weber* and will dismiss this action without prejudice to allow petitioner to return to state
7 court to exhaust his claims.

8
9 **IT IS THEREFORE ORDERED** that petitioner's motion for issuance of stay and
10 abeyance pursuant to *Rhines v. Weber* is **DENIED** (Docket #30).

11 **IT IS FURTHER ORDERED** that petitioner's motion to file supplemental authority
12 in support of his reply to respondents' opposition is **DENIED** (Docket #38).

13 **IT IS FURTHER ORDERED** that this petition for writ of habeas corpus is
14 **DISMISSED** without prejudice. The Clerk is directed to enter judgment accordingly and to close
15 this case.

16
17 DATED this 22nd day of Sept., 2009.

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19 
20 UNITED STATES DISTRICT JUDGE

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25 ¹The court has considered petitioner's motion to file supplemental authority in support of his
26 reply to respondents' opposition. The court finds the non-binding case authority from another circuit
cited therein to be unpersuasive.